



## **SUBMISSION**

# **STATUTORY DEFINITION OF CHARITY**

**DECEMBER 2011**

## **Introduction**

In the 2011-12 Federal Budget a number of announcements were made in respect to reforms within the NFP sector. This included the establishment of the Australian Charities and Not-for-profits Commission (ACNC); reforming the tax concessions provided to NFPs to ensure that they are targeted to those activities that directly further a NFPs altruistic purpose; and defining charities.

A discussion paper was issued by the Government on 29 October 2011 to help develop a definition of Charity. The NFP and charitable sector plays an extremely important role in society. While it is important to ensure that the tax concessions made available to this sector are not being rorted, it is equally important that the genuine good works carried out by the sector are not harmed. These are important reforms that could have unintentional adverse effects on essential services. We are sure that the Government would like to avoid such consequences if possible.

We welcome the opportunity to make a submission on this matter and thank the Government for initiating this important consultative process. We would be happy to meet with Government to further discuss this policy and the issues outlined in this submission.

## **Aged & Community Services Association of NSW & ACT Inc (ACS)**

ACS agrees with the Government that it is important to have a statutory definition of charity applicable across all Commonwealth and State laws. We also believe it is important that the good works and significant public benefit generated by legitimate charitable and NFP organisations should not be harmed by inadvertent consequences caused by unnecessary levels of regulation or through unnecessary changes to the taxation laws.

ACS provides a comprehensive, one-stop shop for not-for-profit member organisations and for those for-profit organisations that join our Industry Advice Scheme. We are the aged and community care professionals. No other industry association in NSW or the ACT covers the full spectrum of residential care, self care and community care.

Our mission is to provide leadership to the aged and community care sector and to empower our members to provide quality aged care and community services to the clients. It does this by providing a range of services including training, industrial representation and other support services.

As at 30 June 2011 we have 266 members who manage 1,940 services: 716 residential care facilities (229 high care and 487 low care), 453 retirement villages and 771 community care services.

## **The aged care sector**

To provide some context to our submission and our concerns it is important we provide some background information on the aged care sector. The aged care sector is comprised of entities from both the for-profit and NFP sectors. The sector is responsible for serving some of the most vulnerable members of our community: the frail, the elderly, the disabled and those suffering from some form of dementia. On top of this the NFP aged care sector also caters for the financially disadvantaged, veterans and persons from specific ethnic or religious backgrounds.

At 30 June 2010 there were 4,785 approved aged care providers in Australia. Not-for-profit providers constituted the largest category with 3,109 (65%) providers. There were 934 (19.5%) for-profit providers and 742 (15.5%) government providers. Table 1 provides a summary of the industry by ownership status and organisational type for Australia.

Table 1: Aged care providers by category and organisation type, Australia, June 2010

Category of Provider	Organisation Type	Total	Proportion of Category	Proportion of Total Providers
Not-for-Profit	Religious	1,375	44%	28.7%
	Charitable	948	30%	19.8%
	Community Based	786	25%	16.4%
	<b>Category Total</b>	<b>3,109</b>	<b>100%</b>	<b>65.0%</b>
For-Profit	Private Incorporated Body	877	94%	18.3%
	Private Non-Incorporated Entity	4	0.4%	0.1%
	Publicly Listed Company	53	6%	1.1%
	<b>Category Total</b>	<b>934</b>	<b>100%</b>	<b>19.5%</b>
Government	State Government	560	12%	11.7%
	Local Government	182	4%	3.8%
	<b>Category Total</b>	<b>742</b>	<b>100%</b>	<b>15.5%</b>
<b>Grand Total</b>		<b>4,785</b>	<b>100%</b>	<b>100.0%</b>

Source: Aged Care Service List - Australia - as at 30 June 2010, DOHA Report on the Operation of the Aged Care Act 1997 1 July 2009 – 2010.

As seen by this table, aged care services are dependent on the services of charities and not-for-profit entities, so it is essential we avoid unintended consequences from the reforms. It is unclear why DoHA separates the religious and charitable providers, given all the religious organisations have charitable purposes. Several of the concepts are core to our members and have been addressed in detail below.

As an executive summary you are referred to the attachment that gives answers to the 20 questions Treasury posed in its consultation paper “A Definition of Charity”, October 2011.

### Defining Charity – Dominant Purpose and Public Benefit

The various definitional components contained in the Charities Bill 2003 are still relevant and useful in the definition of Charity.

1. Not-for-profit entity
2. Dominant purpose that is charitable
3. For the public benefit
4. Activities must further or aid its dominant purpose
5. Not have a disqualifying purpose
6. No engagement in a serious offence
7. Not a political party, superannuation or government body.

A strength of this list of components is that it is easily understood, could provide the basis of a reporting tool, clarifies that activities must link to the dominant purpose and provides a focus on public benefit. The list contains an essential set of conditions that must be met by an organisation.

However, we do not believe that point 6 above has been clearly defined. It is not acceptable that this be a once and for all time criterion. We support that an organisation must not deliberately engage in illegal purposes. We believe this is a matter that the ACNC should further define and then regulate.

The proposal to remove the “dominant purpose” and replace it with “exclusively charitable” is problematic and not supported. The statement that the Bill could “*clarify that an entity cannot have any independent non-charitable purpose, or that they must be incidental or ancillary to the charitable purpose*” is not clear and detracts from the intended clarity of the reform. In response to discussion question 1 -

1. This is not supported. Dominant purpose is a clear statement and part of a comprehensive set of conditions necessary to fit the definition of Charity.
2. ‘Exclusively charitable purpose’ may introduce unintended consequences in organisations that depend on related activities to fund charitable purposes.
3. This proposal may increase the burden of proof, hinder cross-subsidisation and place barriers to innovation and flexibility in the face of resource pressures.
4. If an entity has a charitable purpose that is sufficient and it must be the test of charitable, without reference to the activities.

### Public Benefit

There is some distortion in the discussion paper when on one hand it says the presumption of public benefit should be removed, and then it states a “charity must demonstrate that they are established for the public benefit, unless the public benefit is self-evident” (para 82). This new concept of “self-evident” needs definition and seems to be supporting the presumption of public benefit.

A charity must operate for a public benefit, and as proposed in the discussion paper the public benefit has two major features:

*“Charity is altruistic and intends social value or utility, and provides a recognised benefit to the community. ... Two aspects to a public benefit test – value or benefit and community.”*  
Para 73, p11.

It is essential when determining the public benefit that “public” be a broad enough concept to include organisations operating in the rural, regional and remote communities of Australia.

The isolated communities and special needs of a dispersed community need special consideration when determining the “sufficient section of the public”.

Therefore in relation to the question 3 we suggest:

Rural, regional and remote Australian communities need to be explicitly addressed within considerations about the sufficient section of the general community.

If the Government seeks to have a statutory definition of benefit, we recommend the development and use of a definition of private benefit. There is precedent for this approach of defining private benefit and it is less problematic. Then the use of public benefit can apply to all those purposes that are not ‘private.’ This enables flexibility in the future as we need to be more innovative in providing the services. Our recommendation therefore is to develop and use a definition of “private benefit”.

However, if you ignore this recommendation, the non-statutory approach taken by England is a more acceptable way to provide clarity and provide guidance on the meaning of public benefit.

### **Role of Australian Charities and Not-For-Profit Commission**

It is unclear why Treasury is taking the lead on determining a definition of charity. Given the ACNC is due to commence operations on 1 July 2012 it should have the lead on these reforms.

ACS believes the Government would be better served by using the newly formed ACNC to undertake a number of projects:

- *Review the definition of charity and charitable purpose*
- *Formulate a clear framework for determination of the charitable status of an entity*
- *Re-examine the taxation implications once these definitions and framework have been established*
- *Assess over time whether all existing charities are working within that framework and whether their charitable purpose is being met on an ongoing basis*
- *Ensuring that funds are not ‘leaking’ from the charitable entity to a related for-profit entity. The ATO already has sufficient powers to focus on this without additional compliance regime*
- *Ensuring that all charitable entities have a clear written strategy for the future use of any reserves that are accumulating and that those uses fall within its charitable purpose*
- *Develop and conduct education programs for those in charge of governance. These programs should cover risk management, financial management and other governance issues. This should help to protect the assets of charities.*

The ACNC should develop a clear and simple test of public benefit (or ideally a test for ‘private’ benefit), and all the necessary preconditions of being a Charity or Not-For-Profit entity. It should be possible to minimise the amount of time and paperwork needed to self-assess and demonstrate a match to all the necessary preconditions for registration as a charity. The self-assessment would not be undertaken unless circumstances had changed or the ACNC was undertaking an audit.

## **Conclusion**

We commend the Government for giving the Charitable and NFP sector the focus it deserves and establishing the Australian Charities and Not-for-profits Commission. We have answered the 20 questions posed by the consultation paper, and those answers are provided in the attachment.

We look forward to the commencement of the ACNC and it taking the lead role in these reforms. The ACNC should be the body charged with finalising the definition of a charity and developing the tests and tools around the necessary preconditions an entity must meet in order to register or retain its registration.

We do not support the inclusion of activities in the definition and believe that activities should be appropriate if they are undertaken to support the dominant purpose of the entity.

We support the development of a definition of “private benefit” and its use, rather than the continued and problematic definition of public benefit.

## Summary Response to the Consultation questions

1. *Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose?*
  - 1.1. This is not supported. Dominant purpose is a clear statement and part of a comprehensive set of conditions necessary to fit the definition of Charity.
  - 1.2. 'Exclusively charitable purpose' may introduce unintended consequences in organisations that depend on related activities to fund charitable purposes.
  - 1.3. This proposal may increase the burden of proof, hinder cross-subsidisation and place barriers to innovation and flexibility in the face of resource pressures.
  - 1.4. If an entity has a charitable purpose that is sufficient and it must be the test of charitable, without reference to the activities.
  
2. *Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?*
  - 2.1 No, it is only a payroll case. This should be addressed expressly in the legislation.
  
3. *Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?*
  - 3.1. Rural, regional and remote Australian communities need to be explicitly addressed within considerations about the sufficient section of the general community.
  
4. *Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?*

Yes.
  
5. *Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?*
  - 5.1. Not in the statutory definition. These principles are good supporting material for the ACNC to use.
  - 5.2. We prefer the term "private benefit" be defined and used.
  
6. *Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?*

- 6.1. The greater flexibility is desirable.
  - 6.2. The approach taken by England and Wales is not necessarily supported, as per comments in the body of the submission.
  - 6.3. It should be stressed that the bulk of the Australian aged care sector is charitable, and despite the collection of some contributions to pay for part of that care, care for the aged remains a charitable purpose. The collection of fees (as per UK experience) is not accepted as excluding the entity as being charitable.
7. *What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?*
- 7.1. This is potentially a good initiative, providing increased transparency and confidence for the community. It must be done in an efficient and easily understandable way.
  - 7.2. The ACNC should develop a tool that clearly sets out the requirements of meeting the tests of 'charity and/or not-for-profit', and have this available electronically.
  - 7.3. The tool would be completed once by an entity and only require updating if circumstances changed.
  - 7.4. Develop and use a definition of "private benefit" rather than try to define 'public benefit'.
  - 7.5. Self-assessment should be the preferred way of determining this, as per the current provisions of the Tax Act.
8. *What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?*
- 8.1. The ACNC has greater independence to regulate the sector holistically including assessing eligibility for tax concessions, based on a self-assessment that can be audited by the ACNC.
  - 8.2. The ACNC should be the lead agency in all matters pertaining to the regulation of Charities and Not-For-Profits. It should:
    - 8.2.1. Review the definition of charity and charitable purpose.
    - 8.2.2. Formulate a clear framework for determination of the charitable status of an entity.
    - 8.2.3. Re-examine the taxation implications once these definitions and framework have been established.
    - 8.2.4. Assess over time whether all existing charities are working within that framework and whether their charitable purpose is being met on an ongoing basis.
    - 8.2.5. Ensure that funds are not 'leaking' from the charitable entity to a related for-profit entity. The ATO already has sufficient powers to focus on this without additional compliance regime.

- 8.2.6. Ensure that all charitable entities have a clear written strategy for the future use of any reserves that are accumulating and that those uses fall within its charitable purpose.
- 8.2.7. Develop and conduct education programs for those in charge of governance. These programs should cover risk management, financial management and other governance issues. This should help to protect the assets of charities.

9. *What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?*

- 9.1. The presumption should not be overturned, and provision of aged care services should explicitly be incorporated.
- 9.2. There is a new concept called “self-evident public benefit” (paragraph 82) which appears to be replacing the presumption of benefit and this adds no value
- 9.3. All current charities should be presumed to have met the requirements of public benefit. They will report on this to the ACNC in the future.
- 9.4. Currently all charities can be required to prove they meet the requirements of the definition, and this requirement can be activated by the ACNC to demonstrate ongoing compliance.
- 9.5. There is no obvious gain in removing this presumption of benefit, other than a request of the ATO, and this should no longer be a feature of regulation of Charities and Not-for-Profit entities under the ACNC.

10. *Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?*

No.

11. *Should the role of activities in determining an entity’s status as a charity be further clarified in the definition?*

The statutory definition must be clear and short. It should not include reference to the activities.

12. *Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?*

No.

13. *Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?*

No comment.

14. *Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?*

The definition of charity proposed is valid for many purposes, not just for taxation purposes. Tax policy should not drive this definition.

15. *In the light of the Central Bayside decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?*

No. Aged care is a heavily funded and regulated sector, but it is not an arm of government.

16. *Is the list of charitable purposes in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes?*

The list is appropriate. However, the provision of not-for-profit aged care services and support should be expressly included.

17. *If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?*

As per way the Charities Bill refers to the young, it should also read "the care and support of the aged".

18. *What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?*

No comment.

19. *What are the current problems and limitations with ADRFs?*

Not applicable.

20. *Are there any other transitional issues with enacting a statutory definition of charity?*

20.1. Treasury is commended for providing a newsletter and more interactive consultative mechanism. This should be an ongoing feature of the reforms.

20.2. In line with a more transparent engagement process, these submissions should be made available on the newly created ACNC web site.

20.3. Recognise that charities and not-for-profit entities exist with minimal administrative overheads, and operate with volunteer staff. The cost of compliance (in terms of time and money) must be kept low or the entity and its services will be destroyed.

20.4. That a phasing in of these reforms provides entities with enough time and education to allow them to meet the changed conditions.